U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002

Date: April 22, 1999
Case No.: 1996-INA-0235

In the Matter of:

ALLA BROEKSMIT,
Employer

On Behalf Of:

CINIRA APARECIDA GUSKUMA,
Alien

Certifying Officer: Dolores Dehaan, Region II

Appearance: Martin C. Liu, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's (hereinafter "CO") denial of a labor certification application. This application was submitted by Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) (hereinafter "the Act"), and Title 20, Part 656, of the Code of Federal Regulations (hereinafter "C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On October 24, 1994, Alla Broeksmit (hereinafter "Employer") filed an application for labor certification to enable Cinira Aparecida Guskuma (hereinafter "Alien") to fill the position of Cook (AF 12-13). The job duties for the position are:

> Plan and prepare menus and cook meals according to recipes and taste of employer; plan and purchase materials needed for cooking; keep kitchen area and utensils clean; serve meals and assist in light housekeeping of the cooking area.

(AF 13).

The minimum requirement for the position is two-years experience in the job offered (*Id.*). Other Special Requirements for obtaining the position are "be[ing] willing to remain O/T and provide references." (*Id.*). The work schedule shown on the application is from 8:00 a.m. until 6:00 p.m., "[w]ith a 2 hour break during the day." (*Id.*).

The CO issued a Notice of Findings on September 22, 1995 (AF 29-32), proposing to deny certification on the ground that the job opportunity does not appear to constitute full-time employment, thereby violating § 656.50 (now recodified as § 656.3). The CO directed Employer to establish that the job offer meets the definition of 'employment' as provided in the regulations either by amending the job duties or by providing evidence that clearly establishes that the position offered constitutes full-time employment for a Cook and was not created only to qualify Alien for a visa as a skilled worker. Additionally, the CO proposed denial of certification on the ground that the work schedule constitutes a requirement for the job opportunity not normally required for the performance of the job in the United States, thereby violating § 656.21(b)(2). Specifically, the CO found that the hours of work listed on the ETA 750A form do not constitute the normal scheduled hours of a live-out household worker. Accordingly, the CO advised Employer to rebut this finding by either amending the work hours to a normal live-out schedule, deleting the restrictive requirement, or documenting how the requirement arises from business necessity. Employer was notified that it had until October 27, 1995, to rebut the findings or to cure the defects noted.

---

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

In its rebuttal dated October 25, 1995, and submitted under cover dated October 27, 1995 (AF 33-43), Employer responded to the issues raised by the CO. Regarding whether the job offered constitutes full-time employment, Employer began by noting that the household consists of two adults and three children, ages 5, 8, and 18 (AF 42).[2] The Cook is responsible for preparing breakfast, consisting of eggs, toast, cereal, coffee, fruits and pancakes, for the children and occasionally the adults (*Id*.). Planning, purchase and preparation of breakfast should take 1½-2 hours (*Id*.). The Cook is responsible for preparing lunch, normally consisting of sandwiches, pasta, meat, vegetables and fruit, for the children who bring the meal with them to school, and occasionally for the adults (*Id*.). Planning, purchase and preparation of lunch should take approximately two hours (AF 41). The Cook is responsible for preparing after school snacks, normally consisting of sandwiches, fruits, muffins and vegetables, for the children and their friends (*Id*.). Planning, purchase and preparation of snacks should take approximately 45 minutes (*Id*.). The Cook is responsible for preparing dinner for the entire family (*Id*.). Planning, purchase and preparation of dinner should take 3-4 hours (*Id*.). Employer estimate that three or four times per month they host dinner parties or brunches (*Id*.). Such functions often last until 10:00 p.m. or 11:00 p.m. (*Id*.).

The only cleaning or housekeeping required of the Cook is that which is incidental to the cooking duties (*Id*.). Previously, Employer has performed the cooking duties and, therefore, has not employed a full-time cook (AF 40). General housekeeping is performed by Employer (*Id*.).

Employer's younger children are at school from 8:15 a.m. until 3:00 p.m. (*Id*.). "[W]hen the parents are absent from the home and the cook fully engaged in preparing meals, [Employer] would utilize, on occasion, a babysitter. During periods when the Cook has time off [Employer] would also use an occasional babysitter." (*Id*.). The children are frequently fully engaged in after school activities and, therefore, require minimal supervision (*Id*.).

Employer concluded by noting that she and her husband are both kept very busy by their respective businesses (AF 39-40). They both frequently return home very late, and ensuring that meals are served in a timely manner necessitates employing a full-time cook (AF 39).

Regarding the issue of whether the work schedule is required by business necessity, Employer wrote that the hours specified " are essential [for the Cook] to perform the job in a reasonable manner." (*Id*.). Employer noted that the children normally begin dinner at 5:30 p.m. and finish by 6:00 p.m. (*Id*.). The adults usually eat later, after arriving home from work (*Id*.). "If our cook were to work only until 4.00pm (sic) for example, we would be unable to serve [our preferred types of meals] in [their] freshest state to our children during our dinner hour. The children in contrast, would have to eat food for dinner prepared a couple of hours earlier." (*Id*.).

The CO issued the Final Determination on November 21, 1995 (AF 44-47), denying certification on two grounds: the job opportunity does not constitute full-time employment, thereby violating § 656.50 (now recodified as § 656.3); and, the work schedule constitutes a

---

[2] Employer's 18 year-old son "attends prep school from which he visits home frequently for vacations and holidays. When he is home ... he eats breakfast, lunch, and dinner." (AF 40).

requirement for the job opportunity not normally found in the United States and not justified by business necessity, thereby violating § 656.21(b)(2). Specifically, the CO considered Employer's evidence regarding the full-time nature of the position as unconvincing (AF 45). The CO noted that the 18 year-old child is frequently absent from the home and that the younger children leave for school 15 minutes after the Cook arrives at work (*Id*.). Thus, the CO found that "[i]t is not clear that breakfast is a regular responsibility of [the] Cook." (*Id*.). The CO further wrote that "[s]ince all member of the household appear to be absent from morning to late afternoon each day, it is not clear that Cook performs permanent full-time work on a daily basis for this household...." (*Id*.). Finally, the CO considered it unclear "who is responsible for care of two children, ages five and eight years old, while parents are gone from early morning to evening and children are not in school." (*Id*.). The CO also found Employer's evidence regarding the business necessity of the restrictive work schedule to be unconvincing (AF 44). According to the CO, "Employer's requirement for the unusual work schedule described appears to rest on the snack time and dinner time of children; employer does not present other information." (*Id*.).

On December 26, 1995, the Employer requested reconsideration or, alternatively, review of the Denial of Labor Certification (AF 48-60). The CO denied reconsideration on February 26, 1996 (AF 61), and on March 14, 1996, forwarded the record to this Board of Alien Labor Certification Appeals (hereinafter "BALCA" or "the Board").

Discussion

The CO denied Employer's labor certification application in the case *sub judice* on the grounds that the job offered does not constitute "full-time employment" as defined in the regulations, and that the job offered contains an unduly restrictive requirement not arising from business necessity.

This matter falls squarely within our holding in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*)[3]. Therefore, we hold as stated in *Uy* that:

> In view of the lack of clarity of the NOF, the inadequacy of the Final Determination, and today's clarification of the "totality of the circumstances" test when the CO raises the issue of *bona fide* job opportunity in an application involving a Domestic Cook, we remand this matter for issuance of a supplemental NOF. This NOF will provide Employer an opportunity to submit evidence of any kind to bolster his contention that he has a *bona fide* job opportunity for a Domestic Cook. The CO shall then consider the existing record and any supplemental documentation submitted by Employer, and issue a Final Determination. If the CO determines that labor certification should be denied, she must explain her rationale for that determination.

Carlos Uy at 16.

[3] Because we believe the entire case should be examined in light of *Carlos Uy*, we do not address the issue of the work schedule.

ORDER

The Certifying Officer's denial of labor certification is **VACATED**, and this matter is **REMANDED** for consideration in light of our decision in *Carlos Uy*.

For the Panel:

_____

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.